IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 598 OF 1994
ALONG WITH
CRIMINAL APPLICATION NO. 862 OF 2005
IN
CRIMINAL APPEAL NO. 598 OF 1994

Chandrakant @ Ramchandra
Raghunath Karke,
Age 25 years, Occ. Agriculturist,
residing at Vinzar, Tal.
Velha, District Pune. ...Appellant.

V/s

The State of Maharashtra ...Respondent.

Mr. V.G. Peshave, advocate for the appellant.

Mr. A.S. Shitole, APP for the State.

CORAM: V.M.KANADE,J.
DATE: 23rd February, 2005

ORAL JUDGMENT:

1. The appellant is the original accused who is challenging the judgment and order passed by the Additional Sessions Judge, Pune in Sessions Case No.359 of 1993 whereby the Additional Sessions Judge convicted the appellant - original accused No.1 for the offence punishable under section 363 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for two years and further to pay fine of Rs 1000/- and, in default of payment of fine, to suffer simple imprisonment for six months. He, however, acquitted the accused No.1 of the offence

punishable under section 366 of the Indian Penal Code. The accused was released on bail during the pendency of the appeal.

2. During the pendency of the appeal, the appellant filed Criminal Application No. 862 of 2005. In the said application, he has stated that permission may be granted to the complainant and the applicant, the appellant herein, to compound the offence and the judgment and order passed by the Trial Court may be quashed. He has stated in the said application that the mother of the prosecutrix has filed an affidavit in which she has stated that the complaint was filed on account of misunderstanding between the parties and that the prosecutrix is now happily married and has two children and that the applicant also is married and has two children. She has stated in her affidavit that she and the applicant were neighbours and, at that time, there was some misunderstanding against the accused and the relations between them were strained. By order dated 15/02/2005, this application was directed to be heard along with the main appeal.

3. The prosecution case in brief is that the complainant Kusum Shaikh was residing with her husband and three sons and one daughter Amina at Village

Winzar, Taluka Velha, District - Pune and that the accused along with his parents and brother was residing near their house and that they had good cordial relations. The accused Chandrakant and the complainant's daughter Amina who was 16 years of age used to talk with each other. According to the prosecution, on 12/07/1992, the complainant's daughter Amina was present in the house. The food was prepared in the evening and after they had their meals at 7.00 p.m., at 8.00 p.m. Amina went out to answer the nature's call. Since she did not come back, the complainant and her husband tried to search her. However, they were not successful in their attempt. Thereafter, her husband went in the village alongwith his son Balu to find Amina. However, She was not found in the village also. According to the prosecution, the motor-cycle of Yeshwant was also not found near his house. The complainant suspected that Chandrakant might have taken Amina somewhere on the motor-cycle of Yeshwant. On inquiry being made at the house of Chandrakant, his father informed the complainant that there was a quarrel between him and Chandrakant, as a result of which Chandrakant had left the house and, therefore, a complaint was lodged at Velha Police Station against Chandrakant and Yeshwant under section 363 read with section 366 of the Indian

Penal Code.

4. The Trial Court acquitted the accused No.2 Yeshwant - father of Chandrakant of the offence punishable under section 363 and 366 of the Indian Penal Code. The Trial Court also acquitted the appellant of the offence punishable under section 366 of the Indian Penal Code, however, convicted him for the offence punishable under section 363 of the Indian Penal Code.

5. The offence of kidnapping is punishable under section 363 and punishment is for a term up to seven years alongwith fine. The prosecution has examined four witnessses.

6. P.W. 1 - Kusum Mohammed Shaikh is the mother of Amina. In her evidence she has stated the sequence of events and has stated that accused No.2 told her that he would bring her daughter Amina back. In her evidence, she has stated that Amina was 16 years old when she was kidnapped and on the third day of the incident, Amina returned home. From her evidence, it can be seen that apart from having a mere suspicion that the present appellant had taken away her daughter, no other evidence has been brought on record

by her to implicate the appellant. She has stated that she suspected that the appellant - Chandrakant had kidnapped her daughter merely because the motor-cycle of Yeshwant was not found near his house and she suspected that son of Yeshwant Chandrakant had kidnapped Amina on the said motor-cycle. From her evidence, it can be seen that her suspicion that Chandrakant had kidnapped Amina was confirmed when accused No.2 told her that he would bring back Amina. From her evidence, it can be seen that the complainant had filed a complaint on the basis of suspicion and doubt. She has not stated in her evidence that after Amina came back on third day, she had informed him that she was kidnapped by the accused No.1. The fact that the accused No.1 merely had a suspicion that Chandrakant had kidnapped her daughter is fortified in view of the present application which is filed by the applicant in which affidavit of P.W. 1 is annexed in which she has stated that relations between her family and the family of the accused were strained at the relevant time. The evidence of this witness, therefore, does not support the prosecution case.

7. P.W. 2 - Amina in her evidence has stated that the accused No.1 gave a proposal of marriage to her and that she knew the accused No.1 and she was on

talking terms with him. She has further stated that the accused had been giving the proposal of marriage to her for about 5/6 months before the date of the incident. It is pertinent to note that, in her evidence, she has stated that she also waverably responded to the proposal of marriage given by accused No.1 and she felt that she should accept the proposal of accused No.1. She has stated that, accordingly, she and accused No.1 had prepared a plan that they would elope together and get married and, accordingly, on 12/07/1992 in the evening, she left the house on the pretext of answering the call of nature and after she left the house she found that the accused was waiting for her with motor-cycle and, thereafter, she went alongwith the accused on the motor-cycle to Pune and from Pune she went by bus with accused No.1. to Thane. There, the accused No.1 took her to his friend who was present alongwith his wife in their house. She has stated that at 7.00 p.m. brother of accused No.1 Dattu Karake and accused No.2 had arrived at Thane at the house of the friend of the accused No.1 and told her to go back to her house. Accordingly, she returned along with Dattu Karake, the brother of accused No.1 and accused No.2 to their village. Thereafter, a complaint was lodged on 14/07/1992. From this evidence, it can be seen that P.W. 2 -

Amina had accompanied accused No.1 with consent and that she was not forcibly kidnapped by accused No.1. From her evidence, it appears that both of them had decided to get married and, for that purpose, both of them had come to Thane. From this evidence, it is difficult to come to the conclusion that Amina was taken against her will from her house.

8. The only question, therefore, which needs to be considered is : whether Amina was a minor at the relevant period?

9. The prosecution has examined Narayan Khashaba Ghadage as P.W. 3. P.W. 3 was working as Village Development Officer at the relevant time and he produced the original register which was maintained by the Village Panchayat. In the said register, there is an entry made on 11/05/1976 that the female child was borned to Mohammed Manik Shaikh and Kusum Mohammed Shaikh. This entry was made on 31/07/1976 in the month of July, 1976. The name of the child was shown as "Muslim". This witness in his cross-examination has admitted that there is no maternity home or hospital near village Winjar and, generally, the delivery used to take place at the parents' house of the woman. He also admitted that no confirmation was

made about the actual date of birth of a child by the Village Panchayat. He also admitted that he did not know the name of wife of Mohammed Shaikh was Kusum. From the cross-examination of this witness, it has been established by the defence that the actual date of birth is never confirmed by the Village Panchayat as the information about the date of birth of a child is given by the parents of the child. Thus, the sole reliance cannot be placed on the birth certificate which is produced by P.W.3. It was the duty of the prosecution to have obtained an opinion of the doctor, after conducting oscification test in support of the claim of the prosecution that Amina was a minor on the date of the offence. In the present case, in fact, the prosecution has not examined the doctor in support of its case. In my view, therefore, there is a serious lacuna in the prosecution case. It has not been established beyond the reasonable doubt that Amina was a minor on the date of the offence.

10. The prosecution has, thereafter, examined P.W. 4 - A.S.I. Uttam Laxman Wadari. In his cross examination P.W. 4 admitted that no panchanama was drawn when Amina had been brought to the Police Station. He admitted that no statement of any person was recorded proving the fact that somebody had

produced Amina or to prove that she herself had appeared in the Police Station. He admitted that the parents of Amina arrived in the Police Station, after they came to know that Amina had come to the Police Station. He also admitted that Amina was carrying bag with her. However, no panchanama was drawn in respect of the bag or its contents. From the admission given by the Investigating Officer in the cross-examination, in my view, it has not been established by the prosecution as to whether Amina had come on her own to the Police Station or she had been brought by someone else.

11. Thus, with all this evidence, it is difficult to come to a conclusion that Amina had been kidnapped by the appellant. It has not been established that Amina was a minor on the date when the alleged offence had taken place. The Trial Court, in my view, clearly erred, firstly, in giving a finding that Amina was a minor on the date of the incident without considering and appreciating the evidence on record. The Trial Court in para 18 of its judgment, without appreciating the evidence on record of P.W.3, has given a finding that the prosecution has proved the fact that Amina was below 18 years of age on the date of the offence. In my view, this finding is not borne out from the

evidence on record. Secondly, the Trial Court has also erred in holding that from the evidence of Amina and her mother, it had been established by the prosecution that the appellant had kidnapped Amina. In my view, the said finding is not based on proper appreciation of evidence. P.W. 1, mother of Amina, has stated that on mere suspicion she had filed a complaint. She has not stated in her evidence that after Amina returned on the 3rd day of the incident to her house, she had informed her mother that she was kidnapped. Even Amina in her statement does not say that she was kidnapped forcibly by the appellant. Both the said findings, therefore, recorded by the Trial Court will have to be quashed and set aside.

12. Apart from this, an affidavit which has been subsequently filed by P.W. 1, mother of Amina, further establishes that the complaint was filed on account of misunderstanding and the strained relations which existed between the two families.

13. In the result, appeal is allowed. The judgment and order passed by the Additional Sessions Judge, Pune in Sessions Case No. 359 of 1993 is quashed and set aside. The appellant is acquitted of the offence punishable under section 363 of the Indian Penal Code.

The bail bonds of the appellant - accused stands cancelled. No further orders are necessary to be passed on Criminal Application No. 862 of 2005 which is disposed of in view of the disposal of the appeal in the above terms.

(V.M. KANADE, J.)